No. 02-71656

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHELLE THOMAS; DAVID GEORGE THOMAS; TYNEAL MICHELLE THOMAS; SHELDON WAIDE THOMAS,

Petitioners,

v.

JOHN ASHCROFT, Attorney General,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

PETITION FOR REHEARING *EN BANC*

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INTRODUCTION

Attorney General John Ashcroft, Respondent, respectfully petitions for rehearing *en banc*. The panel majority failed to adhere to binding circuit precedent when it held that a family could be a "particular social group" under the asylum statute. The panel also violated circuit precedent and the controlling statute when it reached an asylum claim that was argued neither to the immigration judge nor to the Board of Immigration Appeals. As a result of these compound errors, the panel has usurped the policy functions of the Attorney General and has dictated, for the first time, that a family victimized by private criminals can establish statutory eligibility for asylum solely on the basis of their family relationship, regardless of the reasons for the threats or attacks against the family. Defining "social group" so broadly not only creates tensions with other elements of asylum law and circuit precedent, but also implicates sensitive questions of foreign and international policy.

1. *En banc* review is warranted because the panel's holding – that the Thomas family is a "particular social group" – is in sharp tension with controlling circuit precedent. This Court has previously determined that "no case * * * extends the concept of persecution of a social group to the persecution of a family, and we hold it does not," reasoning that "[i]f Congress had intended to grant refugee status on

account of 'family membership,' it would have said so." Estrada-Posadas v. INS, 924 F.2d 916, 919 (9th Cir. 1991).

2. Equally, full court review is warranted because the panel overlooked binding circuit precedent and the controlling federal statute barring a court from hearing an asylum claim that was not raised before the immigration judge or the BIA. The INA provides that a "court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. § 1252(d)(1). This Court has repeatedly recognized that under the plain language of the statute, exhaustion of administrative remedies is a prerequisite to the Court's jurisdiction. See Barron v. Ashcroft, 358 F.3d 674, 677-678 (9th Cir. 2004). Moreover, to exhaust an asylum claim, the applicant "must first raise the issue before the BIA or IJ." Rojas-Garcia v. Ashcroft, 339 F.3d 814, 819 (9th Cir. 2003).

Here, although the "family" as social group issue had never been argued to the immigration judge or the BIA, the panel asserted jurisdiction and decided it because Ms. Thomas had checked a "social group" box on her original asylum application. Ms. Thomas never presented a "social group" claim during her administrative hearing appeal, however, the panel lacked jurisdiction over the claim under this Court's controlling precedent.

This Court has recognized that "[t]he purpose of the exhaustion requirement [codified in Section 1252(d)(1)] is to avoid our court's premature interference with the agency's processes." Silva-Calderon v. Ashcroft, 358 F.3d 1175, 1177 (9th Cir. 2004). Those purposes are crucial here because the decision to consider a family unit, without more, a "social group" under asylum law has sensitive policy implications. Because the victims of private crime ordinarily do not qualify for refugee status under current asylum law – the government is insufficiently involved in the attacks for the crime to amount to "persecution," and citizens can usually protect themselves from crime by relocating within their own countries – it is far from certain that the expert administrative decisionmakers would recognize statutory eligibility for asylum, as the panel majority did, under circumstances that present no broad, nationwide threat to the family and constitute nothing other than isolated episodes of private crime.

This Court granted rehearing *en banc* in 2001 when the government's rehearing petition argued that the panel should not have reached the question whether the family of a child victim of domestic violence was a "particular social group." Aguirre-Cervantes v. INS, 242 F.3d 1169 (9th Cir.), rehearing granted, opinion vacated 270 F.3d 794 (9th Cir.), vacated on rehearing *en banc*, 237 F.3d 1220 (9th Cir. 2001). This case renews the opportunity, lost three years ago when Aguirre-Cervantes

became moot before argument *en banc*, for this Court to address the questions it found worthy in Aguirre-Cervantes of full court review.

STATEMENT

a. Michelle Thomas, her husband and two children decided in March 1997 to leave their home in Durban, South Africa and move permanently to the United States. See Slip Opinion ("Op.") at 2659. The Thomases obtained visitors visas and sought asylum about a year after their arrival.

In her original asylum application, Ms. Thomas candidly explained that her family was leaving South Africa because since 1994, when elections established majority rule and ended apartheid, street crime had increased dramatically and economic and educational opportunities had declined. A.R. 410. Ms. Thomas explained that "over a thousand people are leaving South Africa daily with no intentions to return." *Ibid.* She stated that "[p]olitical corruption and the lack of law enforcement has made it unsafe [and] demoralizing" for her family to remain in South Africa. *Ibid.*

In addition to detailing her dissatisfactions with the new South Africa, Ms. Thomas checked a box on the asylum application form marked "Membership in a particular social group" to indicate that she had suffered government mistreatment on

that basis. See Op. 2665, 2667 n.4, R.A. 327. She did not specify any particular "social group" or allege that her family was a social group.

At her asylum hearing, Ms. Thomas testified that Ronnie Thomas, her father-in-law and a former foreman at a Durban construction company, was a racist who abused his black workers. Slip. Op. 2657.[1] She testified that before her father-in-law retired, her family was singled out for "threats of physical violence and intimidation" by black workers seeking retribution for Mr. Thomas's workplace abuse. *Ibid.* According to Ms. Thomas, her "dog was apparently poisoned," her car was vandalized, and human feces were thrown at her house. Op. 2658. Later, a black man wearing the construction company's overalls threatened to cut Ms. Thomas's throat. *Ibid.* Finally, Ms. Thomas testified that black men in construction-company overalls tried to take her young daughter from her while she was outside her gate, but they were scared away. *Id.* 2659.

Ms. Thomas also submitted numerous reports and articles on crime in South Africa. These articles describe ongoing racial tensions in South Africa, giving examples of both white on black violence (see, *e.g.*, A.R. 340), and violence by blacks against whites (*e.g., id.*, 373-74). During her asylum hearing, Ms. Thomas twice

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[1] Mr. Thomas retired in 1998, before Ms. Thomas and her family left South Africa. A.R. 320.

explicitly clarified that her asylum claim was based exclusively upon the threatening conduct of four or five black workers retaliating against her father-in-law's allegedly racist conduct.[2]

b. The Immigration Judge denied the asylum applications. She acknowledged that Ms. Thomas believed that her family was at risk "because she believes as a White citizen of South Africa that she is subject to persecution by Black citizens of South Africa." A.R. 72. The Judge explained, however, that Ms. Thomas's documentary evidence describing crime in South Africa was not sufficient to show "government sponsored persecution" against crime victims. *Id.* 75. She pointed out that "there is no country in the world that can offer its citizen 100% protection from retaliation by any members of a society, organized crime or unorganized crime." *Ibid.*

The Judge also found that the Thomases' claim was based upon "personal retaliation of workers who worked for the father-in-law who abuses them." A.R. 76. The Judge held that because neither "personal problems" nor "general conditions in

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[2] When asked to confirm that the threats and intimidation "happened to you because of your father-in-law * * * [n]ot because of your race, your religion, your membership in a social group, a political opinion, any of these reasons[,]" Ms. Thomas agreed: "Father-in-law, yes." A.R. 173. Again, when asked to clarify that she had stated her family was allegedly harmed for no reason more general than that the black workers "hated [the father-in-law] and wanted to come after you," Ms. Thomas confirmed that the description of her testimony was accurate. A.R. 202, Op. 2666 n.2.

a country such as anarchy, civil war or mob violence" can ground an asylum claim (*id.* 76), the applicants had failed to establish that they had suffered persecution on a statutorily protected ground. *Id.* 80.

c. Ms. Thomas appealed to the BIA, arguing that her asylum claim established "a well-founded fear of persecution on account of race if compelled to return to South Africa." A.R. 9. See also *id.* at 13 (arguing that the record established that the Thomases had "suffered from past persecution on account of their race"). Ms. Thomas argued that the South African government's inability "to protect white South Africans from violent crime and lawlessness" meant that the Thomas family should be given asylum in the United States. *Id.* at 14. The BIA summarily affirmed the Immigration Judge's decision. A.R. 4.

In her briefs to this Court, Ms. Thomas argued a "social group" claim for the first time, contending that the Immigration Judge erred "not only in discounting race as a basis for Petitioners' persecution, but their membership in a social group, *i.e.*, as members of a family." Pet. Br. 14.

d. The panel majority granted the Thomas's petition for review. Stating that "the case law has been somewhat unclear" on the question whether a family can be a social group (Op. 2667), the panel nonetheless quoted Lin v. Ashcroft, No. 02-70662 (9th Cir. Jan 26, 2004), as holding that "[w]here family membership is a sufficiently

strong and discernible bond that it becomes the foreseeable basis for personal persecution, the family qualifies as a 'social group.'" *Id.* 2668. Applying that test, the panel held that "the petitioners have demonstrated that the alleged persecution suffered was a result of the fact that they are related to Boss Ronnie [Ms. Thomas's father-in-law]'" and it concluded that "the acts committed against the Thomases were sufficiently linked to their family membership so as to constitute alleged persecution on the basis of membership in a particular social group." Op. 2668.

The panel rejected the government's position that the Thomas family had failed to establish asylum eligibility because neither personal retaliation nor a high national crime rate is a ground for asylum. Op. 2668. The panel acknowledged that personal retaliation cannot ground an asylum claim "*precisely because it is action not tied to one of the statutory bases.*" *Ibid.* The panel determined, however, that "given [the] conclusion that the petitioners' family qualifies as a 'particular social group,' the acts constituting persecution were not purely personal retribution against the petitioner; instead, they were actions *on account of* one of the statutory grounds." *Id.* 2669.

The panel also reversed the Immigration Judge's finding that there was insufficient evidence of any governmental role in the alleged persecution to support Ms. Thomas's asylum claim. Op. 2670. Holding that the Immigration Judge had failed to apply the correct legal standard, the panel remanded the case so that the BIA

could decide in the first instance whether the government of South Africa was unable or unwilling to protect the Thomas family. *Id.* at 2671.

e. Judge Fernandez dissented on numerous grounds. He pointed out the illogic of a decision whereby although if "a disgruntled employee slugs his boss for cheating him out of his wages, that is decidedly not persecution," nonetheless, "if the employee takes a cowardly swipe at his boss's daughter-in-law, that, according to the majority, is persecution." *Id.* 2671-72. By extending asylum protection to claimants "who are in no proper sense true refugees," Judge Fernandez concluded, the majority decision "makes a mockery of the serious concerns that lie behind the virtually universal desire to protect people who are truly being persecuted in their own countries." Op. 2673.

ARGUMENT

A. The panel's unprecedented holding – that a family is entitled to asylum in the United States because one member's work-place conduct provoked a few employees into violent retribution against other family members – conflicts with this Court's precedents and is highly questionable in light of the fundamental principles of asylum law.

The INA provides that a person may be a "refugee" eligible for asylum if he or she has been persecuted "on account of * * * membership in a particular social group[.]" 8 U.S.C. § 1101(a)(42)(A). In 1991, this Court addressed whether a family

unit, by itself, qualifies as a "social group" under the asylum statute. Estrada-Posadas, 924 F.2d at 919. This Court observed at that time that "no case * * * extends the concept of persecution of a social group to the persecution of a family." *Ibid.* The Court reached and decided that issue: "we hold it does not." *Ibid.* As the Court explained, "[i]f Congress had intended to grant refugee status on account of 'family membership,' it would have said so." *Ibid.*

The panel's holding here – that "[w]here family membership is a sufficiently strong and discernible bond that it becomes the foreseeable basis for personal persecution, the family qualifies as a 'social group'" slip op. 2668 – cannot be squared with the longstanding holding of Estrada-Posadas. The panel majority accordingly mischaracterized this Court's law when it cited Lin v. Ashcroft, No. 02-70662 (9th Cir. Jan. 26, 2004), as having "clarified" that a family can be a "particular social group" in this Circuit. Because this Court in Estrada-Posadas squarely held that a family is not a social group, any change in the law must be made by the *en banc* Court, rather than by another panel.[3]

At a minimum, Lin and the panel decision here have created substantial confusion in regard to this issue and as to the controlling force of Estrada-Posadas.

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[3] Furthermore, the panel that decided Lin has now *sua sponte* sought the parties' views on whether the case should be reheard *en banc* on the issue whether a family can constitute a social group for asylum purposes.

En banc review is needed to correct the panel's error and to clarify this important aspect of asylum law.

B. Furthermore, this case calls for *en banc* review because the panel reached the "family unit" as social group issue, even though that issue had never been argued to the immigration judge or the BIA. The panel not only violated circuit precedent and the controlling statute, but it improperly deprived the Attorney General of the opportunity to address in the first instance an important and sensitive question of asylum law.

1. Under the INA, "a court may review a final order of removal only if * * * the alien has exhausted administrative remedies available to the alien as of right." 8 U.S.C. § 1252(d)(1). Thus, an alien's "[f]ailure to raise an issue below constitutes failure to exhaust administrative remedies and deprives this Court of jurisdiction to hear the matter." Farhoud v. INS, 122 F.3d 794, 796 (9th Cir. 1997). See also Barron, 358 F.3d at 677-678 ("§ 1252(d)(1) mandates exhaustion and therefore generally bars us, for lack of subject-matter jurisdiction, from reaching the merits" of unexhausted claims); Silva-Calderon, 358 F.3d at 1177. This Court has specifically held that an asylum applicant's failure to raise a "social group" claim administratively deprives this Court of jurisdiction over the claim. See Cordon-Garcia v. INS, 204 F.3d 985, 988 (9th Cir. 2003).

Here, the court lacked jurisdiction over Ms. Thomas's "social group" claim because she did not present that claim to either the immigration judge or the BIA. Rather, she claimed asylum on the basis of "a well-founded fear of persecution on account of race if compelled to return to South Africa." A.R. 9 (BIA brief). Ms. Thomas not only insisted that her claim was based upon the racism of Boss Ronnie and the race-based retaliation of the black workers, but she twice expressly disavowed making any claim based upon social group membership. See A.R. 173, 202.

The panel majority not only did not – and could not – find that the Thomases had presented any "social group" claim to the immigration judge or the BIA, but it quoted Ms. Thomas's explicit disavowals of any claim based upon membership in a "social group." See Op. 2666 n.2.[4] The panel asserted jurisdiction despite those disavowals because the Thomases checked a "social group" box on their original asylum application rather than the companion box marked "race." See *id.* at 2665, 2667n.3.

The panel was mistaken in holding that checking a box on an asylum application is enough for administrative exhaustion of an asylum claim. This Court's cases

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[4] Although the government did not separately argue that Ms. Thomas had waived the social group claim, it emphasized to the panel that Ms. Thomas had explicitly disavowed making any such claim. In any event, exhaustion in this context pertains to the subject-matter jurisdiction of the Court and it cannot be waived. See Barron v. Ashcroft, 358 F.3d 674, 677-78 (9th Cir. 2004).

consistently hold that to exhaust an asylum claim, the applicant "must first raise the issue before the BIA or IJ." Rojas-Garcia, 339 F.3d at 819. See also Barron, 358 F.3d at 677 ("'if a petitioner fails to raise an issue before an administrative tribunal, it cannot be raise on appeal from that tribunal'"). Ticking a box on an asylum application – a preliminary form that only initiates the application process – and thereafter abandoning the claim is a far cry from actually raising and arguing an issue before the immigration judge or the BIA.

The panel's contrary determination threatens to seriously disrupt immigration proceedings. Not only immigration judges, but also the members of this Court, would have to check the paper record in every case for traces of undeveloped but theoretically cognizable claims. Such a procedure directly frustrates the purposes of exhaustion. See Rojas-Garcia, 339 F.3d at 819 (exhaustion "'avoids premature interference with the agency's processes and helps to compile a full judicial record'").

2. Moreover, defining the ambiguous term "particular social group" is a matter that the INA unambiguously commits to the agency in the first instance. Congress has charged the Secretary of Homeland Security "with the administration and enforcement" of the INA (8 U.S.C. § 1103(a)(1)), with the proviso that "determination and ruling by the Attorney General with respect to all rulings of law shall be controlling." *Ibid.* It has authorized the Attorney General to exercise the adjudicative

powers formerly committed to the Executive Office for Immigration Review, and to "review such administrative determinations in immigration proceedings" as he deems necessary. *Id.*, § 1103(g). Congress also demonstrated its commitment to administrative resolution of asylum matters by constraining the scope of judicial review in asylum cases. See *id.*, § 1103(a)(1) (Attorney General's legal rulings controlling); *id.* § 1252(b)(4)(C) (factual asylum determinations are "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary").

The Supreme Court, too, has emphasized the primacy of administrative decision-making in asylum cases. It has held that "the BIA should be accorded Chevron deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication[.]'" INS v. Aguirre-Aguirre, 536 U.S. 415, 424 (1999) (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987)). And in INS v. Ventura, 537 U.S. 12, 16 (2002), the Court confirmed the "obvious importance in the immigration context" of the principle that "a court should remand a case to an agency for decision of a matter that statutes place primarily in agency hands." Ventura, 537 U.S. at 16.

This broad grant of primary authority over asylum cases to the Executive Branch is entirely appropriate: "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's

political departments largely immune from judicial control." Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953). The asylum statute, in particular, must be interpreted by the Executive Branch in the first instance because it implements the United States' obligations under an international treaty, the U.N. Refugee Protocol. And this Court, construing treaty implementation statutes, has acknowledged the "'primacy of the Executive in the conduct of foreign relations' and the Executive Branch's lead role in foreign policy." Taiwan v. U.S. Dist. Court for the N. D. of Ca., 128 F.3d 712, 718 (9th Cir. 1997). And the Supreme Court has emphasized that because the Executive Branch officials who interpret and apply the immigration laws must often "'exercise especially sensitive political functions that implicate questions of foreign relations,'" courts should extend particular deference to the determinations of the executive officials as they exercise those functions. Aguirre-Aguirre, 526 U.S. at 425.

Those principles apply with full force to the question whether a family unit, without more, is a "particular social group" under the asylum statute. Deciding whether ordinary crime victims may be eligible for asylum in the United States based upon family membership requires administrative expertise because such an expansion of the statute creates immediate tensions with other elements of the asylum claim. In particular, the agency would have to consider carefully whether, or how, statutory

eligibility based upon family membership might be reconciled with the dual requirements that persecution implicate the government and that an alien seeking asylum be unable to find safety anywhere at home.

Moreover, the decision whether to consider a family unit, without more, a "social group" for the purposes of asylum law raises sensitive policy implications, including the international implications of the United States' definition of conduct that amounts to persecution. Under established asylum law, the victims of private crime ordinarily do not qualify for refugee status for two reasons; first, the government is insufficiently involved in the attacks against them for the crime to amount to "persecution," and second, because citizens ordinarily can protect themselves against criminal attacks by relocating within their own countries.

First, asylum affords surrogate protection to those whose own governments cannot protect them and accordingly "[t]he feared persecution must come from either the government or a group the government is unable to control." Elnager v. INS, 930 F.2d 784, 788 (9th Cir. 1991). As a conceptual matter, when the asylum claim is based upon violence inflicted against a particular family for reasons unrelated to any of the traditional grounds for asylum, alleged persecution is indistinguishable from

other crime.[5] Governmental involvement in the alleged "persecution" thus might have to be established by reference to the government's general efforts to control crime, precisely the type of evidence that Ms. Thomas invoked here to support her claim alleging racial persecution. See A.R. 344-380 (reports and studies on crime in South Africa). As the panel correctly recognized, however, under current law this "evidence regarding general crime trends in South Africa" would be insufficient to support an asylum claim. See also Gormley v. Ashcroft, 364 F.3d 1172, 1177 (9th Cir. 2004) (rejecting the asylum claims of South Africans who claimed they were victimized by criminals because they were white, in part because "random, isolated criminal acts perpetrated by anonymous thieves do not establish persecution").

Second, because "a government may expect that an asylum seeker be unable to obtain protection anywhere in his own country before he seeks the protection of another country," a cognizable asylum claim must allege that the refugee have a country-wide fear of persecution in his country of origin. Mazariegos v. INS, 241 F.3d 1320, 1327 (11th Cir. 2001). See also Cordon-Garcia, 204 F.3d at 990. This principle fits poorly with statutory eligibility based upon membership in a family

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[5] Although the panel remanded for the BIA to determine whether the South African government was unable or unwilling to protect the Thomases, the remand does not cure the legal difficulties of recognizing overall crime statistics as acceptable evidence of governmental involvement in persecution.

victimized by particularized local crime, since ordinarily such a family could find safety elsewhere at home. There is no apparent reason here, for example, why the Thomas family could not relocate within South Africa to avoid any threat posed by four or five former employees of a retired foreman in suburban Durban.

For all of these reasons, if asylum is to be made available to the family members of individuals whose activities provoke violent retribution, then that decision should be made in the first instance by the agencies charged by Congress with the administration of the immigration laws.

C. Although this Court granted rehearing *en banc* three years ago when the government's rehearing petition argued that the panel should not have reached the question whether the family of a child victim of domestic violence was a "social group," that case became moot before oral argument. Aguirre-Cervantes, *supra*. This case now presents almost the same questions that this Court found worthy of *en banc* rehearing in Aguirre-Cervantes. Because their significance has, if anything, only increased, this Court should vacate the panel opinion and grant rehearing *en banc*.

CONCLUSION

For the foregoing reasons, the Court should rehear this case *en banc*.

Respectfully submitted,

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JUNE 2004

CERTIFICATE OF COMPLIANCE WITH NINTH CIRCUIT RULE 40-1(a)

I hereby certify, as required by Ninth Circuit Rule 40-1, that this Petition For Rehearing *En Banc* is proportionately spaced, has a typeface of 14 points and contains 4,176 words, according to the word count feature of WordPerfect 9.0.

June 7, 2004
Date

Anne Murphy
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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2004, I caused the foregoing Petition for Rehearing *En Banc* to be filed with this Court and to be served upon the following counsel by Federal Express Overnight mail:

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IN THE UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

MICHELLE THOMAS (A75-597-033)
DAVID GEORGE THOMAS (A75-597-034)
TYNEAL MICHELLE THOMAS (A75-597-035)
SHALDON WAIDE THOMAS (A75-596-036)
Petitioners,

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JOHN ASHCROFT, Attorney General
Respondent.

ON PETITION FOR REVIEW OF AN ORDER
OF THE BOARD OF IMMIGRATION APPEALS

PETITIONERS' BRIEF IN OPPOSITION TO PETITION FOR REHEARING *EN BANC*

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INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners, a South African family, were the victims of a series of increasing threats, and acts, of physical violence, culminating in the attempted kidnaping of their minor daughter. Petitioners established, without contradiction, that the intimidations were directed against them because of abuses perpetrated by their racist relative. Because they could not protect themselves, and the government of South Africa was unable or unwilling to do so, they sought asylum in this country, due to their persecution on account of their membership in a particular social group.

The Panel found that the acts committed against Petitioners were directly related to their family relationship, and therefore, such membership qualified as membership in a particular social group for purposes of establishing a claim of asylum.

This Court should deny *en banc* review for the following reasons:

1. The Panel's decision was wholly consistent with existing precedent in this circuit, and broke no new ground. Indeed, the Panel, instead of creating a "bright-line" rule, merely re-affirmed this Court's case-by-case analysis that looks to whether the *specific* family before it qualifies as a social group under the Immigration Act.

2. Petitioners presented the issue of persecution on account of their familial

relationship--- and therefore, as membership in a particular social group—before the IJ. Moreover, although Respondent is now—incorrectly—asserting that Petitioners failed to raise the issue below, it is Respondent who failed to raise the issue of exhaustion of remedies—before the Panel. Therefore, Respondent is precluded from seeking rehearing, because it cannot claim the Panel overlooked or misapprehended a point of law or fact never made. *F.R.App.P.* Rule 40(a)(2).

3. Respondent's final claim—that the Panel's decision somehow implicates sensitive questions of foreign and international policy, which may only be resolved by the Executive Branch—is at once ambiguous, nebulous, and borders on meaningless. Moreover, as with its exhaustion of remedies claim, the failure of Respondent to present this argument to the Panel prevents its consideration on a petition for rehearing.

The opinion of the Panel is consistent with existing Ninth Circuit decisions. Respondent is not entitled to a "second bite" at the apple to raise issues never argued to the Panel in the guise of a rehearing. The petition for rehearing should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioners are natives and citizens of South Africa, who entered the United States as visitors at Los Angeles, California, on May 28, 1997. Within one year of

their arrival, they filed Requests for Asylum pursuant to § 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158. Slip Opinion ("Op.") at 2657.[1] In their asylum application, Petitioners checked a box on the form to clearly indicate that it was based upon their membership in a particular social group. Op. 2665, 2667 n.4.

At their asylum hearing, Petitioner Michelle Thomas testified that she and her family had come to the United States to avoid threats and acts of physical violence and intimidation leveled against them due to the abuses committed by Michelle's father-in-law, "Boss Ronnie." Michelle testified—without contradiction—that her father-in-law was, and is, a racist, who as foreman at Strongshore Construction Company in Durban, South Africa, abused his black workers. Op. 2657. Among the acts she testified to were the poisoning of the family dog, vandalization of their car, and the throwing of human faces and subsequent placement of feces at various locations on their property. Op. 2658.

Eventually, Michelle, in the presence of her children, was threatened by a Strongshore employee with having her throat cut. Subsequently, four black men, one of whom wore Strongshore overalls, approached her and attempted to grab her minor daughter from her arms, knocking her to the ground in the process. The individuals

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[1] The Slip Opinion ("Op.") is attached to Respondents Petition for Rehearing.

fled upon the approach of a neighbor, who was alerted by Michelle's screaming. Op. 2658-2659.[2]

Michelle testified at the asylum hearing that she and her family were being persecuted *because of* their familial relationship with her racist father-in law, i.e., her membership in a particular social group—the family. Op. 2666-2667, fns.2, 3.

Finally, Petitioners presented overwhelming evidence—again uncontradicted by Respondent—that the government of South Africa was unable or unwilling to control the conduct of the private individuals who were pursuing the Thomas'. See Petitioners' Opening Brief, pp. 6-8.

The IJ denied Petitioners' request for asylum. She based her denial primarily on the erroneous ground that the evidence presented by Petitioners outlining the crime rate in South Africa, and the refusal or inability of the government to protect them, did not show that the South African government was sponsoring the violence. Op. 2670-2671. But this was the wrong standard. *Navas v. INS* 217 F.3d 646, 656, n. 10 (9th Cir. 2000). (Government inaction in the face of persecution can suffice); *Surita v. INS* 95 F.3d 814, 819 (9th Cir. 1996).

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[2] She also submitted a declaration concerning several incidents of vandalization and house breaking concerning her brother-in-law. She noted that unlike her family, her father-in-law lived in a virtual "fortress"—presenting a substantially more difficult target for retribution. Id.

The BIA summarily affirmed the decision of the IJ.

On appeal, Respondent addressed the Thomas' argument that they were being persecuted because of their membership in a particular social group–the family. Respondent quibbled only with Petitioners' conclusion as to their basis for asylum, characterizing the persecution as "purely personal retribution." (Respondent's Brief, pp. 23-24) *Respondent never asserted before the Panel that Petitioners had failed to allege persecution on the basis of family affiliation before the IJ or BIA, and that they had therefore failed to exhaust their administrative remedies. Nor did Respondents raise the novel claim that unstated "sensitive policy implications" give the Executive Branch sole and final authority to enforce, and interpret, the immigration laws.*

The Panel concluded that Petitioners had demonstrated they were persecuted based upon their relationship with Boss Ronnie. As the Court stated:

> " . . .we find that the acts committed against the Thomases were sufficiently linked to their family membership so as to constitute alleged persecution on the basis of membership in a particular social group. In both *Lin*[3] and the instant case, the petitioners' familial relations are a but-for cause of the alleged or feared persecution." Op. at 2668.

The Panel also found that the IJ had applied the wrong standard as to whether

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[3]*Lin v. Ashcroft* 356 F.3d 1027(9th Cir. 2004)

the government of South Africa was unable or unwilling to protect the Thomases, because she had considered only whether "the South African government is sponsoring or promoting or condoning [the] violence." Op. at 2670-2671.

Therefore, the Panel remanded to the BIA to apply the proper standard. Ibid.

STANDARD FOR REHEARING *EN BANC*

F.R. App.P. Rule 35(a) provides, in relevant part:

" An en banc hearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance."

See also Rule 40(a)(2) ("The petition [for rehearing] must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended.").

The instant petition meets neither test. As shown, infra., the Panel's decision is consistent with established precedent in this Circuit. See, e.g., *Lin v. Ashcroft*, 356 F.3d 1027, 1039-1041(9th Cir. 2004); *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) (Nuclear family is prototypical example of a social group); *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999)(Persecution targeting a given family can

support a well-founded fear of persecution by remaining members).

Moreover, despite Respondent's vague claim that this case implicates international considerations, there are no "questions of exceptional importance" presented. *Indeed, Respondent never raised this issue—or that of an alleged failure to exhaust administrative remedies—before the Panel.* Therefore, the petition for rehearing does not, and cannot, state any points of law or fact that the Panel has overlooked or misapprehended—because the Panel could not, and did not, overlook or misapprehend arguments never made to it in the first instance.

The petition for rehearing *en banc* should be denied.

ARGUMENT

I. THE COURT SHOULD NOT REHEAR THIS MATTER

A. The Panel Followed Existing Ninth Circuit Precedent in Holding That a Family Can Constitute a Social Group

The gravamen of Respondent's petition for rehearing—that the Panel's holding "is in sharp tension with controlling circuit precedent"—is simply wrong. The Ninth Circuit has previously, and consistently, held that a family can constitute a "social group" as one of the five categories which qualify an alien for asylum. 8 U.S.C. § 1101(a)(42)(A) (setting forth the categories, including "membership in a particular

social group.")

In *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986), this Court, in an extensive analysis of the history and meaning of the term "social group," stated that "a prototypical example of a 'particular social group' would consist of the immediate members of a certain family, the family being a focus of fundamental affiliational concerns and common interests for most people." 801 F.2d at 1576 (emphasis added).

The recognition of the family as a quintessential "social group" enunciated in *Sanchez-Trujillo* has been repeatedly reaffirmed by this Court, most recently in *Lin v. Ashcroft*, supra. [4] In *Lin*, the Court re-affirmed the concept that a family can constitute a "particular social group" where there is a sufficient linkage between the family membership and the alleged persecution. 356 F.3d at 1039-1041.

In *Chen v. Ashcroft*, 289 F.3d 113, 116 (9th Cir. 2002), *vacated on other grounds*, 314 F.3d 995, this Court stated that it was "settled" and "the law of our circuit" that a nuclear family constituted a "social group" for purposes of an asylum claim. 289 F.3d at 1115-1116. The *Chen* Court noted that "it is only on account of membership in the family that Jian Chen [the asylum seeker] would be deemed

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[4]Petitioners are aware that a petition for rehearing *en banc* is pending in *Lin*. However, as of the date of this opposition, Petitioners are unaware of any action taken on the petition.

punishable." Id. at 1116. Since Chen "would be punished . . . precisely on account of his membership in [his mother's] family," the Court held that he had sufficiently established fear of future prosecution sufficient to entitle him to asylum. Id.

In *Mgoian v. INS*, 184 F.3d 1029 (9th Cir. 1999), the Court approvingly cited *Sanchez-Trujillo*, stating that "it should now be clear that a pattern of persecution targeting a given family that plays a prominent role in a minority group that is the object of widespread hostile treatment supports a well-founded fear of persecution by its surviving members." 184 F.3d at 1036. See also *Molina-Estrada v. INS*, 293 F.3d 1089, 1095 (9th Cir. 2002)("[W]e have recognized that, in some circumstances, a family constitutes a social group for purposes of the asylum and withholding-of-removal statutes."); *Pedro-Mateo v. INS*, 224 F.3d 1147, 1151 (9th Cir. 2000)(noting that this circuit has stated "that the 'prototypical example' of a social group would be 'immediate members of a certain family.'").

In addition, this Court has frequently recognized that an asylum applicant can demonstrate a well-founded fear of persecution based on acts of violence which are directed against his or her family members. In *Arriaga-Barrientos v. INS*, 937 F.2d 411 (9th Cir. 1991), this Court held that "acts of violence against a petitioner's friends or family members may establish a well-founded fear, notwithstanding an utter lack of persecution against the petitioner herself." 937 F.2d at 414. And in *Hernandez-*

Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985), the Court stated that "the fact that there have been a number of threats or acts of violence members of an alien's family is sufficient to support the conclusion that the alien's life or freedom is endangered." 777 F.2d at 515. See also *Argueta v. INS*, 759 F.2d 1395, 1397 (9th Cir. 1985)(Petitioner had well-founded fear of persecution, due in part to the fact that his close friend and brother-in-law had been tortured and killed).

In *Estrada-Posadas v. INS*, 924 F.2d 916 (9th Cir. 1991)—the sole case relied upon by Respondent for the assertion that the Panel's decision in this case was "unprecedented," and "in sharp conflict with controlling precedent"—the Court stated that "family membership" was not necessarily "a particular social group." 924 F. 2d at 919. However, the "family" in that case was ill-defined, consisting of a cousin, an uncle, and "relatives on [the asylum seeker's] mother's side of the family." Id. at 918. Further, the immigration judge in that case had determined that the applicant was not a credible witness—in contrast with the instant case. See Thomas Op., at 2663.[5] Moreover, the Court in *Estrada-Posadas* found that the petitioner had simply failed to prove a well-founded fear of persecution, since there was "no evidence that the

[5] The Panel nonetheless explored whether any adverse finding on Petitioner's credibility may have influenced the IJ's decision, and found that to the extent it did, such adverse finding was not supported by substantial evidence. Id. at 2665.

petitioner had been persecuted at all, or that she lived with her persecuted family members, or was otherwise readily identifiable as a member of their family unit." Id. at 920. Finally, of course, as noted above, since *Estrada-Posadas*, this Court has repeatedly reaffirmed *Sanchez-Trujillo*'s recognition that a family can constitute a social group.

B. Other Circuits and the BIA Also Recognize That a Family May Constitute a "Social Group"

The Ninth Circuit is not alone in recognizing that a family can constitute a "family group" for purposes of asylum. This is also the law in the First and Seventh Circuits. *Gebremichael v. INS*, 10 F.3d 28, 36(1st Cir. 1993) ("There can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family."); *Ravindran v. INS*, 976 F.2d 754, 761, n.5 (1st Cir. 1992)(explicitly adopting *Sanchez-Trujillo* formulation); *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985) (recognizing family relations can be the basis of a "social group"); *Iliev v. INS*, 127 F.3d 638, 642, and n. 4(7th Cir. 1997)(citing *Sanchez-Trujillo* and holding that "a family constitutes a cognizable 'particular social group' within the meaning of the law").

In addition, the BIA has held that a "social group" can include a family. Thus, in *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), the BIA stated that "we interpret

the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties . . . ." 19 I&N Dec. at 233 (emphasis added). Indeed, the Basic Law Manual of the INS states that "INS asylum and refugee adjudicators may recognize a family as constituting a particular social group." U.S. Dept. of Justice, Immigration and Naturalization Service, The Basic Law Manual at 45 (1994).

The notion that innate, shared and immutable characteristics are inherent in a "social group" is the well recognized test in this circuit. See *Hernandez-Monteil v. INS*, 225 F.3d 1084(9th Cir. 2000) (A "particular social group" is one which is either "united by voluntary association, including a former association, *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it." 225 F.3d at 1093 & n. 6 (emphasis in original). Membership in a family is an innate and immutable characteristic that one simply cannot change. In addition, close family members share a fundamental characteristic which may identify them to others. See. *Gomez v. INS*, 947 F.2d 660, 664(2d Cir. 1991) (Holding that a "particular social group is comprised of individuals who possess some fundamental characteristic in common which serves

to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general.").

As controlling Ninth Circuit precedent is—contrary to the claim of Respondent—consistent with the Panel's holding in this case, the petition for rehearing should be denied.

C. Rehearing Should Not Be Granted on the Additional Grounds of Failure to Exhaust Administrative Remedies Because Petitioner Raised Membership in A Family Group Before the IJ, and Respondent in any Event Failed to Argue the Issue Before the Panel

Respondent asserts, once more erroneously, that "the court lacked jurisdiction over Petitioners' 'social group' claim because it was allegedly not presented to either the immigration judge or the BIA. Rather, says Respondent, Petitioners claimed asylum on the basis of 'a well-founded fear of persecution on account of race if compelled to return to South Africa.'"(Respondent's Petition for Rehearing, p. 12). This argument fails for two reasons.

First, and in fact as the Panel noted, "the petitioners do not appear to contend seriously that their race or political opinion was the basis for their persecution." Op. at 2666 (and quoting, at n. 2, testimony of Michelle Thomas disavowing any claim that she was being persecuted because of her race).

Rather, as the Panel further explained:

" As the government points out, at one point Michelle appeared to deny that the persecution was based on membership in a particular social group. *Nevertheless, she consistently stated that the persecution was based on her relationship to her father-in-law, and she should not be penalized for failing to recognize during questioning that that relationship can be articulated as one of the legally-recognized bases for relief from removal*. . . . [noting testimony in the record before the IJ]. Moreover, her application clearly states that her mistreatment was based on her membership in a particular social group." Op. at 2666-2667, n.3 (emphasis added).

The exhaustion of remedies argument also fails because it was never made before the Panel in the first instance. Thus, Respondent has not, and cannot argue, that the Panel has overlooked or misapprehended a point of law for fact, because it could not overlook or misapprehend a point not raised before it. *F. R. App. P.* Rule 40(a)(2).

D. Rehearing On the Grounds of "International Implications" Vague, Improper, And is an Issue Never Made Before the Panel

Respondent's last point in support of it's Petition for Rehearing is that "the decision whether to consider a family unit, without more, a 'social group' for purposes of asylum law raises sensitive policy implications, including the international implications of the United States' definition of conduct that amounts to

persecution." (Respondent's Petition for Rehearing, p. 16). Instead, Respondent argues that the decision of whether to grant, or withhold, asylum to family members who claim persecution on that basis "should be made in the first instance by the agencies charged by Congress with the administration of the immigration law." (Id. at 18). Presumably, the "agency" Respondent has in mind is within the Executive Branch. This point must be rejected for additional reasons.

First, it is nebulous, and enunciates no standards governing how, or when, or under what circumstances asylum based upon membership in a family group will be granted, and when not.

Secondly, Respondent is apparently arguing that the Executive Branch, which is charged with enforcing and implementing the immigration laws passed by the Legislative Branch, is to have the sole, and final say, as to the binding interpretation of these laws. Under this scenario, neither this Court—nor, presumably, the United States Supreme Court—have any role in overseeing the proper interpretation, application and/or enforcement of the immigration laws, if the Executive Branch asserts some unknown "sensitive policy or international implications." This is a radically untenable—and unsupported—theory.

Third, Respondent fails to pinpoint how the decision in this case raises any "sensitive" or international implications whatsoever, The Panel's opinion, did not

STATEMENT OF COMPLIANCE WITH NINTH CIRCUIT

RULE 40-1(a)

Pursuant to Local Rule 40-1(a) of this Court, I certify that the Petitioners'Opposition to the Petition for Rehearing *En Banc* has been formatted in monospaced Times New Roman 14 point, the text is double-spaced and according to the word count feature on the word processor by which this Brief has been prepared, consists of 3652 words. The footnotes are in Times New Roman 14 point, and are single spaced.

CERTIFICATE OF SERVICE

I certify that on June 30, 2004, I caused to be served on counsel for Respondent two copies of the foregoing Petitioners' Brief in Opposition to Petition for Rehearing *En Banc*, by deposit in the United States Mail and transmitted by First Class, postage pre-paid mail, to

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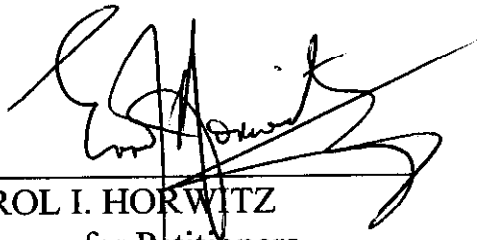

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